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No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

KAREL FRANCISCUS GOELST,
Petitioner,

v.

JANNA WILHELMINA GOELST,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the trial court erred in denying Petitioner's Motion to Dismiss based on lack of in personam jurisdiction, in view of the uncontroverted evidence adduced at trial that Petitioner never intended to establish residence in the forum, and that his contacts with the forum were unrelated to the subject matter of the litigation.

2. Whether the trial court violated Petitioner's right to a trial in accordance with constitutional due process by its refusal to grant a new trial in view of the harmful and clearly prejudicial hearsay testimony of a trial witness, admitted over proper objection, which testimony was inadmissible as a matter of law.

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The petitioner, Karel F.J. Goelst, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia denying his Application for Appeal, and his Motion for Reconsideration entered in this proceeding on March 3, 1987.

I. JUDGMENTS BELOW

The order issued by the Superior Court of Cobb County in the State of Georgia denying the Petitioner's Motion for New Trial is set forth in the Appendix at A61.[1] The order denying Petitioner's Application for Discretionary Appeal in the Supreme Court of the State of Georgia is set forth in the Appendix at A63. The order denying Petitioner's Motion for Reconsideration from that same Court is set forth in full in the Appendix at A65.

II. JURISDICTION

The denial of Petitioner's Motion for Reconsideration issued by the Supreme Court of the State of Georgia was entered

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1. References to portions of the record, which are reproduced in the Appendix, are designated by their appropriate page numbers, preceded by "A."

on March 3, 1987. The jurisdiction of this Court is invoked under Article 3, Section II of the United States Constitution and 28 U.S.C. 2104.

III. APPLICABLE CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the United States Constitution provides in pertinent part: "No state shall... deprive any person of life, liberty, or property, without due process of law... ."

IV. STATEMENT OF THE CASE

The Respondent filed a Petition for Divorce in June of 1985. A1. The Petitioner, who no longer resided in Georgia, denied in his Verified Special Answer that the Georgia Court had jurisdiction over his person. A12. In his accompanying Affidavit, Petitioner stated that he no longer resided in

Georgia, and had only been present in that state for the purpose of giving his deposition since the Petition for Divorce was filed. The trial court overruled various jurisdictional objections and the matter went to trial on July 21, 1986. At trial, the issues centered on the income and net worth of the Defendant and the determination under Georgia law of a fair and equitable division of marital property.

As the evidence demonstrates, the primary issue in the case was the determination of an appropriate division of property and amount of alimony to be awarded to the Respondent. The main business asset of the Petitioner, as indicated by the transcript in the proceedings below, is a Dutch corporation which is a 100 percent subsidiary of a Swiss corporation which was owned either

singly or jointly by Respondent and Petitioner.

Because of the complexity of the economic circumstances of this divorce, which included corporations in two European countries, assets valued in Swiss francs, Dutch guilders, United States dollars, and debts payable to corporate, personal, and banking institutions, the dispute over the appropriate division of property and alimony was fierce.

Unfortunately, Appellant was unable to attend the trial of this case by medical conditions over which he had no control. Indeed, upon his arrival in Atlanta for the giving of his deposition, he became deathly ill and spent over five weeks in St. Joseph's Hospital in Atlanta. This, coupled with the fact that Appellant has had heart surgery, has a pacemaker implant, and has suffered

several major strokes, prevented his appearance at trial. Accordingly, Petitioner's testimony was given by deposition.

Given the conflict concerning actual assets and income of the Petitioner, corroboration by third party witnesses assumed tremendous significance.

The testimony of one Bob Schuitenmaker, formerly a manager in the Dutch corporation, was of apparently pivotal impact and importance in Respondent's case. Much of this witness's testimony, reproduced beginning at A38 of the Appendix hereto, involved hearsay evidence to which Petitioner's counsel maintained a continuing objection. It was the position of the Court that any out-of-court statement made to the witness by the Petitioner was admissible. Over Petitioner's counsel's continuing objection, the witness continued to

testify as to alleged statements made by the Petitioner which indicated that the Petitioner intended to defy any order of the court requiring him to pay money to the Respondent and that, further, he intended to conceal portions of his wealth from Respondent in order to circumvent his lawful responsibilities in the context of property settlement with Respondent.

In addition to his Answer, A12, accompanied by his Affidavit stating the facts upon which his jurisdictional objections were based, A17, which were submitted at trial, Petitioner made continuing and timely objections to the exercise of the Superior Court's jurisdiction over his person. A45. As the facts set forth in his Affidavit, and as corroborated by Respondent's own testimony at A33, the Petitioner did not maintain a matrimonial domicile in

Georgia either at the time of the commencement of the action or at any other time. The facts adduced at trial indicate that at no time did the Petitioner Goelst reside in this state, nor did Respondent's action for divorce and property settlement arise out of any conduct by the Petitioner within Georgia.

Further, Petitioner conducted no business activities within the State of Georgia or in the United States.

On July 24, 1986, the jury returned a verdict that required Petitioner to pay $10,000 a month as alimony and required Petitioner to relinquish his entire estate in the parties' real and personal property located in the State of Georgia. Unfortunately, this award is such that Petitioner is wholly unable to comply--his gross income from all sources is less than $80,000.00 U.S.

The Petitioner timely filed his Motion for a New Trial, and arguments were heard before the Court in September of 1986. On December 17, 1986, the trial court denied Petitioner's Motion for New Trial and entered a Final Dispositional Judgment and Decree. Based on the trial court's lack of jurisdiction over him and upon the improper admission of prejudicial hearsay testimony, the Petitioner appealed to the Supreme Court of the State of Georgia. Petitioner's Application for Discretionary Appeal was denied in February of 1987, with his Motion for Reconsideration was also denied, on March 3, 1987.

V. SUMMARY OF ARGUMENT

The questions presented herein concern the trial court's failure to grant Petitioner's Motion for New Trial and the

lack of jurisdiction over the person of the Petitioner.

In its trial proceeding, the Cobb County Superior Court of the State of Georgia denied certain fundamental rights of procedural justice to the Petitioner, Karel F. J. Goelst, the Defendant in the within and foregoing action. He was subjected to a trial of a court having no jurisdiction over his person. Having improperly asserted jurisdiction, the Court, over object of counsel, permitted the jury to consider irrelevant and highly prejudicial hearsay testimony. The resultant verdict was contrary to law, and the judgment was excessive and against the weight of the evidence. The magnitude of the forfeiture resulting from these violations of the fundamental principles of due process calls for this Court to examine the issues presented

herein and grant Petitioner's Request for a Writ of Certiorari.

VI. ARGUMENT

A. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION TO DISMISS BASED ON LACK OF JURISDICTION, IN VIEW OF THE UNCONTROVERTED EVIDENCE THAT PETITIONER LACKED THE MINIMUM CONTACTS REQUIRED BY DUE PROCESS TO ASSERT JURISDICTION OVER HIS PERSON.

The exercise of long-arm jurisdiction over a non-resident property settlement defendant in this case is an unconstitutional application of Georgia law. (See Georgia "Long-Arm" Statute, reproduced at A67.) The trial court's exercise of jurisdiction violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The exercise of jurisdiction over the Defendant Karel Goelst violates the standards of "fair play and substantial justice" established by this Court as a limitation on the power of the individual states to exercise in personam jurisdiction over non-resident defendants. Mr. Goelst's contacts with the forum were neither purposeful, nor were the events leading up to the breakup of the marriage and the attendant division of property related to the forum.

The constitutional exercise of long-arm jurisdiction depends first upon whether the non-resident has sufficient minimum contacts with the forum to justify the assertion of in personam jurisdiction. International Shoe v. Washington, 326 U.S. 310 (1945). Later cases help redefine the analysis to a two-part inquiry. First, a state may assert personal jurisdiction only where

the defendant "purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." Hanson v. Denckla, 357 U.S. 235, 253 (1958). See also, Worldwide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980); Kulko v. Superior Court, 436 U.S. 84, 94 (1978). Second, a state may exercise in personam jurisdiction only where the defendant's purposeful conduct is sufficiently related to the claim. Rush v. Savchuk, 444 U.S. 320, 327 (1980); Hanson v. Denckla, 357 U.S. at 251-254.

In Kulko v. Superior Court, 435 U.S. 84 (1978), this court applied the foregoing two-part test to determine whether sufficient minimum contacts existed to bind a non-resident domestic relations defendant into the forum chosen by the plaintiff. In that case, the

court held that the husband's contacts with the forum state were insufficient to support the exercise of long-arm jurisdiction. Id. at 101. While the case involved a child support and custody modification claim, the court's analysis is directly applicable to the case at bar.

The defendant in Kulko lacked purposeful contacts with California. The fact that the couple had been married during a brief visit to California sometime earlier and that the defendant had visited the state on another occasion were simply too insubstantial to find jurisdiction within the bounds of due process. Id. at 92-93. The separation agreement, which allowed the children to live for the summers with their mother in California, and the fact that the defendant father often permitted his children to spend more time with their

mother in California than was required under the agreement, were insufficient to find that the defendant "purposefully availed himself of the benefits and protections of California's laws." Id. at 97-98.

The holding of Kulko amply demonstrates that one spouse's unilateral activity in the forum cannot bind the other spouse to the jurisdiction thereof in the absence of the defendant's purposeful availment of the privileges and protections of the forum's laws. That is, when the claim arises from the defendant's "personal domestic relations and the defendant has not purposefully derived any financial benefit from forum related activity, jurisdiction is unreasonable." Id. at 96-97.

In the instant case, the Defendant Karel Goelst conducted no business activity in Georgia, nor was Georgia his

domicile of choice. His livelihood was earned exclusively by the companies owned and controlled in Europe, and his legal residence for all purposes was Campione, Switzerland.

It is not contested that his ownership of a single parcel of residential real estate in Georgia, purchased with proceeds of a similar residential investment property sold within one year of purchase in the state of Florida, unquestionably subjects that portion of his property to the jurisdiction of the forum. However, that single instance of his ownership of residential investment property is a contact too tenuous to subject Mr. Goelst's European businesses and property located in Europe to the jurisdiction of the Georgia court.

Kulko also stands for the principle emphasized by the Court in Rush v.

Savchuk, 444 U.S. 320 (1980), that the defendant's conduct in the forum must be related to the claim asserted. In Kulko, the plaintiff sought a modification of the custody and child support decree. The agreement preceding the decree was issued in New York, as was the decree itself. The events leading up to the litigants' separation occurred in New York. Therefore, it was inappropriate for a claim based on occurrences in another forum to be litigated in California. The Court in Rush focused the jurisdictional inquiry explicitly on the importance of the relationship among the defendant, the forum, and the litigation. Id. at 327.

In the case at bar, not only is the Petitioner Goelst not sufficiently related to the forum, but there does not appear to be a constitutionally sufficient relationship between the

claims asserted against Mr. Goelst at trial and the forum. It is clear from the testimony in the trial record that the events leading to the breakup of the marriage occurred outside the forum, as did all of the parties' income-producing activities.

As Rush v. Savchuk teaches, it is possible for a defendant's contacts to have no jurisdictional significance. Here, Mr. Goelst lacked judicially cognizable ties, and the contact between the subject matter of the litigation and the forum was insubstantial.

The foregoing principles were applied in Georgia Supreme Court in the recent case of Marbury v. Marbury, ___ Ga. ___, 352 S.E.2d 564 (1987). In that case, the Marburys had married in the state over a decade prior to the proceeding and had maintained a marital domicile in Georgia for approximately 18

months. Subsequent to their separation, Mrs. Marbury moved back to the state, during which time Mr. Marbury visited the state on several occasions. 352 S.E.2d at 566. The Court noted that there was no indication that the events which led to the dissolution of their marriage occurred in Georgia. Id.

Applying the reasoning of Kulko v. Superior Court, 436 U.S. 84 (1978), the court found that there were insufficient contacts to assert jurisdiction over the non-resident defendant. His contacts with the state did not constitute "purposeful acts which conferred jurisdiction over him" in the sense that he could not "reasonably anticipate being haled into court in Georgia." Id. The Marbury court found that the circumstances did not meet the two-step minimum contacts test, wherein a plaintiff invoking the jurisdiction of the court

must show that the defendant has acted in a manner by which he purposefully avails himself of the privilege of conducting activities within the forum state and, further, that there is a substantial connection between the defendant's activities in the forum and the subject matter of the suit. Id. at 567, citing, Hanson v. Denckla, 357 U.S. 235, 251-254 (1958).

By the same reasoning, Mr. Goelst lacked the contacts with the state that are a prerequisite to its exercise of power over him. Like Mr. Marbury, Mr. Goelst may have availed himself of the benefit of the laws of Georgia in that he purchased residential property in that state and stayed in that residence during his visits to this country for limited, non-business related reasons, under a B-2 Non-Resident Visa. He also was overtaken by illness in this state, requiring

intensive hospital care for almost three months' time. However, there is no indication that this activity on the part of Mr. Goelst had any connection with the subject matter of the present litigation--a division of property pursuant to the dissolution of the marriage. Therefore, the attempt to exercise personal jurisdiction over Mr. Goelst is unconstitutional.

The instant case involves individuals who are of Dutch origin and nationality. Petitioner took great pains not to remain in this country any longer than one hundred eighty (180) days at any one time and consistently refused any status other than that conferred by a B-2 Temporary Visa. As stated in his affidavit, Petitioner's intermittent extended visits to this state to visit family and for medical purposes in no way

reflected a desire to reside in this state.

In light of Petitioner's stated intention not to reside in this state, and the absence of any activity other than to seek medical attention, visit members of his family, and to make a real estate investment in Georgia, it is both manifestly unfair and inconsistent with basic notions of due process to hold that Petitioner purposely subjected himself to the personal jurisdiction of the trial court. Further, the cause of action which the Respondent Mrs. Goelst maintained against her husband did not arise out of Mr. Goelst's activity within this state, but arose out of their joint conduct over the course of their forty-year marriage.

Based on the foregoing, the Petitioner, Mr. Goelst, respectfully requests this Court to grant his Petition

based on the trial court's improper and unconstitutional assertion of jurisdiction over him personally.

B. THE TRIAL COURT'S ADMISSION OF HEARSAY TESTIMONY PREJUDICED THE OUTCOME OF THE TRIAL AND DENIED PETITIONER'S DUE PROCESS RIGHT TO A FAIR TRIAL BEFORE AN IMPARTIAL JURY.

The trial court below committed legal error that prejudiced the outcome of the trial when it permitted, over Defendant's timely objection, certain irrelevant hearsay testimony to be heard and considered by the jury. As set forth in Petitioner's Statement of the Case, supra, and in the Appendix at A38, Respondent's counsel elicited damaging hearsay testimony from Appellant's former employee. The testimony concerned, in substantial part, Petitioner's state of mind with regard to the court proceedings

currently underway in this country and his intention of complying therewith. Despite the patent lack of relevance to the matters at issue, the court allowed the testimony.

Mr. Goelst, an elderly man with a heart condition, was unable to be in this country for the trial and was, therefore, unable to rebut the testimony. The trial court not only allowed the testimony and refused to strike same, but also failed to give any limiting instruction to the jury whatsover.

In the trial court below, the prejudicial testimony at issue was Schuitenmaker's assertion that Petitioner said that he was not going to pay "one penny" to Respondent. There is no fair inference which can be drawn from the referenced hearsay testimony that was in any way material to the issues at trial. Nor does the record reveal any evidence

which was contrary to or could be rebutted by Petitioner's contentions reflected in that testimony by Schuitenmaker.

The matter asserted by the testimony in question did not concern either the scope of Petitioner's assets nor the location thereof. Rather, the inference reasonably to be drawn from the testimony was that, at the time that the remarks were made, Petitioner did not desire to cooperate with the court and would not abide by any order of court. The issue of Petitioner's state of mind at the time of the out-of-court statement was not an issue properly before the trier of fact and was, therefore, erroneously admitted into evidence.

This irrelevant hearsay testimony unfairly prejudiced the outcome of the trial. The hearsay testimony in this case was without probative value. It

supplied no element of proof necessary to assist the jury in its determination of a fair and equitable property settlement. It was admitted in clear violation of the hearsay rule. No fair inference could be drawn from the referenced hearsay testimony which was in any way material to the issues at trial. The inference that the jury obviously drew from this testimony was that, at the time the alleged remarks were made, Petitioner did not desire to cooperate with the court and was determined to withhold his share of a fair settlement from Respondent, Mrs. Goelst.

The improperly admitted evidence allowed the jury to make an erroneous assumption that Mr. Goelst had the intention and indeed the power to defy any settlement imposed by the court. This assumption may have prompted the jury to give the unusually large award.

The standard for determining whether an error is harmful is clear. "Where hearsay evidence is erroneously admitted, though it has no probative value, but could have been considered by the jury and have influenced their verdict, the error is harmful." Knox Metal Products, Inc. v. Watson, 100 Ga.App. 832, 112 S.E.2d 295 (1959) (emphasis supplied). The sole effect of the testimony at issue was to improperly impugn the character of the Petitioner. Proper and timely objections were made by Petitioner's counsel, and the trial court judge even reversed his ruling later in the trial. But, by then, the damage had been done.

The improperly admitted evidence prejudiced the outcome of the trial so as to deprive Petitioner of his right to a fair trial before an impartial jury. In the absence of the exclusion of the evidence or instructions to the contrary,

the jury could have reasonably believed that the Petitioner indeed had the wherewithal to withhold his reasonable share of the assets under his control and thereby thwart the jury's award to Respondent. In an effort to forestall such tactics, the jury chose an extraordinary and inequitable settlement in the expectation that after Mr. Goelst had successfully prevented the transfer of his foreign assets to the Respondent, Mrs. Goelst would be guaranteed a reasonable settlement. In other words, in an effort to do equity, based on its incomplete understanding of the court's power to enforce its judgment in other jurisdictions, the jury's verdict was excessive and contrary to the evidence presented in support of Respondent's claim.

VII. CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued.

Respectfully submitted,

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